

*Draft Document - For Review and Comment*  
*Version 2*  
*October 26, 1998*

MEMORANDUM OF UNDERSTANDING  
between  
USDA-FOREST SERVICE REGION 1  
and  
ENVIRONMENTAL PROTECTION AGENCY REGION VIII  
MONTANA OFFICE  
concerning  
BLOCK P TAILINGS SITE

RECITALS

- A. Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 et seq., the President is responsible for responding to releases of hazardous substances to protect the public health or welfare or the environment.
- B. Pursuant to Executive Order 12580, as amended by Executive Order 13016, the President delegated authority to conduct various activities under CERCLA, including investigations and response activities (42 U.S.C. 9604), cost recovery (42 U.S.C. 9607), and entering into agreements with potentially responsible parties (PRPs) to perform investigations (42 U.S.C. 9622(d)(3)), to several executive departments and agencies, including the Environmental Protection Agency (EPA) and the United States Department of Agriculture (USDA).
- C. USDA has redelegated its authorities under Executive Order 12580 to the USDA Forest Service (FS) with respect to land and facilities under Forest Service authority. 7 C.F.R. 2.60(a)(40).
- D. The FS ~~manages~~ administers National Forest System land and is, with certain limitations, delegated the President's CERCLA authority where a release of a hazardous substance is on or the sole source of the release is from a facility under the jurisdiction, custody or control of the FS. Executive Order 12580, secs. 2(e)(1) and 4(b)(1). Executive Order 13016 amends Executive Order 12580 to authorize FS use of CERCLA Section 106 authority to address releases or threats of releases of hazardous substances affecting lands and natural resources under the FS' custody, jurisdiction and control, subject to the concurrence of the Administrator of the EPA, Executive Order 13016, Section 2. The FS's CERCLA role is also recognized in various provisions of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). 40 C.F.R. Part 300.

- E. Subject to the delegations to the FS described in the preceding Recital D, the President's CERCLA authority related to National Forest System Land and adjoining private land is generally delegated to EPA. Executive Order 12580, secs. (2)(g) and 4(d). The authority delegated to EPA includes the President's authority under 42 USC 9606(a) to issue such orders as may be necessary to protect public health and welfare and the environmental (Unilateral Administrative Orders or UAOs). Executive Order 12580, sec. 4(d)(1).
- ~~F. On August 27, 1993, the FS and EPA entered into a Master Memorandum of Understanding (MMOU) regarding coordination and cooperation between the agencies in support of common objectives and interests. The MMOU encourages the development of supplemental agreements to the MMOU, as needed to accomplish joint projects. This Memorandum of Understanding (MOU) is an agreement supplemental to the MMOU.~~
- ~~G. When releases of hazardous substances occur on or from both private land and National Forest System land, existing CERCLA authority provides the FS and EPA with specific enumerated powers to respond to such releases.~~
- ~~H. There is a PRP (Doe Run Company) who may be responsible for performing response actions and/or liable for response costs incurred by the United States in responding to releases or threatened releases of hazardous substances at the site.~~
- F. The inactive Block P tailings site is located approximately 40 miles southeast of Great Falls, Montana. Part of the site is located within the established boundaries of the Lewis and Clark National Forest in Montana, and part of the site is located on privately owned land. The site is located on both private land and National Forest System land. The FS manages the National Forest System land in the vicinity of the Site from offices located in Great Falls, Montana. The site is further described in the AOC.
- G. The FS and EPA have entered into an Administrative Order on Consent (AOC), dated September 24 and 28, 1998, with the PRP The Doe Run Company (Doe Run), a PRP at the site, for completion of an EE/CA for the site, including both the private and National Forest System land and may jointly sign other AOCs with Doe Run. EPA is a party to this AOC because part of the site is on private lands. By entering into this agreement, EPA is not delegating any CERCLA authority to the FS.
- H. EPA and the FS recognize that for the PRP Doe Run to complete the EE/CA effectively and expeditiously, the agencies must coordinate their respective CERCLA authorities and

communicate a unified position to the PRP. Any disputes between the federal agencies require rapid resolution to avoid delaying completion of the EE/CA.

- I. The purpose of ~~the~~ this MOU is to provide a framework for the coordination of the roles of each agency in the oversight, *preparation and implementation* of the EE/CA, and for the resolution of disputes between EPA and the FS in their oversight of ~~the~~ *any joint* AOCs. The FS will be the lead agency for overseeing ~~the preparation of an~~ EE/CA activities by ~~the PRP~~ Doe Run.
- J. The EPA and the FS have designated the following positions and/or persons who will be involved with the day to day coordination, communication and decision making regarding performance and oversight of the EE/CA:

FS

Robin Strathy

EPA

Rosemary Rowe

AGREEMENTS

1. ~~The FS~~ Each Agency will supply its own the On-Scene Coordinator (OSC) and/or project manager (PM), as provided in Recital M to oversee the completion of the EE/CA at the Site.
- ~~2. The EPA will provide a Project Manager (EPA PM).~~
- ~~3.~~ If either the FS or the EPA changes ~~the~~ *its* OSC or the EPA PM, the agency making the changes will notify the other as soon as possible.
2. The FS will supply documents, including drafts, deliverables, and notices of meetings and sampling activities related to activities at the site to the ~~State representative the Montana~~ Department of Environmental Quality (MDEQ) *and will take those actions necessary to ensure state participation as provided for in the National Contingency Plan (NCP).*

3. The FS's OSC will coordinate with the EPA PM during the performance of the EE/CA activities and the administration of the any AOCs.
  - a. The FS OSC will provide the following to the EPA PM:
    - i. Copies of all documents related to the performance and implementation of the EE/CA or the any AOC related thereto. (The FS OSC and the EPA PC will cooperatively determine the degree and means of the EPA PM's review of documents and decisions other than those listed in paragraph 9 of this MOU.)
    - ii. Reasonable prior notice of, and an opportunity to participate in any scheduled meetings, including teleconferences, with the FS contractor, the PRP or others. In most cases, reasonable prior notice shall be considered seven (7) days. In the event a meeting needs to be scheduled on a shorter notice, the FS OSC shall contact the EPA PM and determine EPA's availability prior to contacting the other parties.
    - iii. Reasonable prior notice of EE/CA activities to take place at the site and an opportunity to participate in oversight of these activities.
  - b. The FS OSC and the EPA PM should communicate regularly, by phone, correspondence and meetings, to review the work status and to resolve any existing or anticipated technical issues. Monthly status calls will be held which will include representatives of the FS, the EPA, and MDEQ. PRP and contractor representatives will be included when appropriate. The calls will update all participants on progress in meeting the project's schedule. During on-site activities, these calls will be held at weekly intervals.  
  
*A schedule of activities for the site will be established by mutual agreement among the three agencies.*
  - c. The EPA PM should advise the FS OSC regarding any issues and concerns of special interest to the EPA, in addition to those described in this MOU, so that the OSC can communicate or provide requested information to the PRP.
4. The EPA PM will normally provide comments to the FS OSC within 21 calendar days of receipt from the FS of a deliverable from the PRP. If the EPA PM determines that additional time is required to provide comments, the EPA PM will discuss the need for a reasonable amount of additional time (normally 15 days or less) with the FS OSC, as soon as that need is identified. The FS OSC may, if necessary request that EPA agree to a shorter review time for a deliverable. If the EPA PM and the FS OSC cannot agree on a

review period. If the EPA PM and the FS OSC cannot agree on a review period, the issue will be elevated immediately with each agency and an agreement shall be reached, if practicable within 48 hours.

5. ~~The FS OSC will be the main contact point for the PRP throughout the EE/CA and will communicate.~~ The FS OSC will take the lead for administering the AOC, including communicating joint EPA/Forest Service responses to the PRP. The FS will include *consider* all comments submitted by EPA. Should the FS and EPA comments be in disagreement, the FS OSC and EPA PM will meet to discuss and resolve the comments.
6. *The FS OSC and the EPA PM will co-sign technical correspondence.*
7. Resolution of and communication regarding legal issues will be coordinated among EPA counsel and USDA counsel.
8. Informal dispute resolution, through heightened consultation between the FS OSC and the EPA PM, ~~is intended to~~ should resolve disputed technical issues between EPA and the FS. However, if the FS' OSC and EPA's PM do not reach agreement on a technical issue at the Site, EPA and the FS will use the dispute resolution process set forth in this MOU.
9. The FS and EPA will jointly concur on the following major decision points:
  - a. The EE/CA Work Plan and any revisions.
  - b. The Community Relations/Public Involvement Plan.
  - c. The EE/CA Approval Memorandum.
  - d. The EE/CA.
  - e. The *joint* Action Memorandum.
  - g. *Removal design plans implementing the action selected.*
  - h. *Certification of completion of response action.*
10. If the FS OSC and the EPA PM do not reach agreement on a decision point listed in

paragraph 9, the issue will be elevated to each agency's management within seven days. The Regional Forester for the Forest Service and the Montana Office Director for EPA shall resolve all disputes. *If the Regional Forester and the Montana Office Director are unable to resolve the dispute, they can decide to elevate the issue further within each agency.*

11. If a situation arises in which either the FS or the EPA believe that stipulated penalties should be imposed on the respondent, the agency making that determination will notify the other party immediately. If the FS OSC and the EPA PM, in consultation with the attorney for each program, cannot agree on whether to pursue stipulated penalties, the procedure described in paragraph 10 will be followed. To the extent that EPA has recovered their costs, collected penalties will go to the FS.
12. ~~Work will continue during dispute resolution, except for work that could potentially prejudice the outcome of the pending dispute. In the event work needs to go forward both agencies will escalate the dispute resolution process, so that work may proceed.~~
13. The dispute resolution process described in paragraph 10 of this MOU is separate from the dispute resolution process described in Section XVI of the AOC with ~~the PRP Doe Run~~. EPA and the FS shall implement Section XVI of the AOC dispute resolution as follows:
  - a. The FS and/or EPA will decide disputes raised by ~~the PRP Doe Run under this AOC as provided in the AOC and this MOU.~~
  - b. If a disputed issue under the AOC is one of the ~~key~~ decision points described in Paragraph 9 of this MOU and a dispute arises between the FS and EPA during the AOC dispute resolution process, the EPA may invoke the dispute resolution process provide in ~~under Paragraph 11 of this MOU~~, unless the issue has already been disputed separately under this MOU. If the AOC and MOU dispute resolution processes are proceeding simultaneously the AOC dispute resolution process may not reach a final decision in a manner inconsistent with the MOU dispute resolution process.
14. The FS and EPA reserve their rights to exercise their rights and authorities under CERCLA, the NCP and applicable Executive Orders, including Executive Order 12580. No provision of this MOU may be used to limit those rights and authorities.
15. This MOU is not a fund obligating document. Any contribution of funds by either the FS

or EPA is solely at the discretion of the agency and will be handled in accordance with applicable laws, procedures and agency policies and guidance.

This MOU shall not be deemed to create any right, benefit, or trust obligation, either substantive or procedural, enforceable by any person or entity in any court against the United States, its agencies, its officers, or any other person.

16. This MOU is effective upon the date signed by the last of the parties.
17. This MOU terminates upon completion and ~~concurrence by EPA~~ issuance by the Agencies of the ~~Action Memorandum~~ *certification of completion of the final response action*. Prior to that, this MOU may be terminated or modified only upon the agreement of both parties. ~~A separate MOU may be negotiated for implementation of the selected removal action.~~ Upon the mutual agreement of the FS and EPA, this MOU may be revised and/or extended to cover the implementation of the selected removal action.
19. This MOU may be executed in counterparts by each of the signatories, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE

By: \_\_\_\_\_  
Regional Forester  
U.S.D.A. Forest Service  
Region I

\_\_\_\_\_  
Date

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ENVIRONMENTAL PROTECTION AGENCY

By: \_\_\_\_\_  
John F. Wardell  
Director  
Montana Office  
EPA Region VIII

\_\_\_\_\_  
Date



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FS's CERCLA role is also recognized in various provisions of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). 40 C.F.R. Part 300.

- E. Subject to the delegations to the FS described in the preceding Recital D, the President's CERCLA authority related to National Forest System Land and adjoining private land is generally delegated to EPA. Executive Order 12580, secs. (2)(g) and 4(d). The authority delegated to EPA includes the President's authority under 42 USC 9606(a) to issue such orders as may be necessary to protect public health and welfare and the environmental (Unilateral Administrative Orders or UAOs). Executive Order 12580, sec. 4(d)(1).
- F. The Block P tailings site is located approximately 40 miles southeast of Great Falls, Montana. Part of the site is located within the established boundaries of the Lewis and Clark National Forest in Montana, and part of the site is located on privately owned land.
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Robin Strathy

EPA

Rosemary Rowe

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If either the FS or the EPA changes its OSC or the EPA PM, the agency making the changes will notify the other as soon as possible.

2. The FS will supply documents, including drafts, deliverables, and notices of meetings and sampling activities related to activities at the site to the the Montana Department of Environmental Quality (MDEQ) and will take those actions necessary to ensure state participation as provided for in the National Contingency Plan (NCP).
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  - 5. The FS OSC will take the lead for administering the AOC, including communicating joint EPA/Forest Service responses to the PRP. The FS will *consider* all comments submitted by EPA. Should the FS and EPA comments be in disagreement, the FS OSC and EPA PM will meet to discuss and resolve the comments.

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9. The FS and EPA will jointly concur on the following major decision points:
  - a. The EE/CA Work Plan and any revisions.
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procedure described in paragraph 10 will be followed. To the extent that EPA has recovered their costs, collected penalties will go to the FS.

12. In the event work needs to go forward, both agencies will escalate the dispute resolution process, so that work may proceed.
13. The dispute resolution process described in paragraph 10 of this MOU is separate from the dispute resolution process described in Section XVI of the AOC with Doe Run. EPA and the FS shall implement Section XVI of the AOC dispute resolution as follows:
  - a. The FS and/or EPA will decide disputes raised by Doe Run under this AOC as provided in the AOC and this MOU.
  - b. If a disputed issue under the AOC is one of the decision points described in Paragraph 9 of this MOU and a dispute arises between the FS and EPA during the AOC dispute resolution process, the EPA may invoke the dispute resolution process provide in this MOU, unless the issue has already been disputed separately under this MOU. If the AOC and MOU dispute resolution processes are proceeding simultaneously the AOC dispute resolution process may not reach a final decision in a manner inconsistent with the MOU dispute resolution process.
14. The FS and EPA reserve their rights to exercise their rights and authorities under CERCLA, the NCP and applicable Executive Orders, including Executive Order 12580. No provision of this MOU may be used to limit those rights and authorities.
15. This MOU is not a fund obligating document. Any contribution of funds by either the FS or EPA is solely at the discretion of the agency and will be handled in accordance with applicable laws, procedures and agency policies and guidance.

This MOU shall not be deemed to create any right, benefit, or trust obligation, either substantive or procedural, enforceable by any person or entity in any court against the United States, its agencies, its officers, or any other person.
16. This MOU is effective upon the date signed by the last of the parties.
17. This MOU terminates upon completion and issuance by the Agencies of the certification of completion of the final response action. Prior to that, this MOU may be terminated or modified only upon the agreement of both parties. Upon the mutual agreement of the FS

and EPA, this MOU may be revised and/or extended to cover the implementation of the selected removal action.

- 19 This MOU may be executed in counterparts by each of the signatories, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.



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UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE

By: \_\_\_\_\_  
Regional Forester  
U.S.D.A. Forest Service  
Region 1

\_\_\_\_\_  
Date

ENVIRONMENTAL PROTECTION AGENCY

By: \_\_\_\_\_  
John F. Wardell  
Director  
Montana Office  
EPA Region VIII

\_\_\_\_\_  
Date